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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 605.

JACKSON COUNTY, MISSOURI, PETITIONER,  
VS.

CLARENCE B. REED, TRUSTEE, RESPONDENT.

TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE  
OF THE UNITED STATES SUPREME COURT, AND THE  
ASSOCIATE JUSTICES OF THE UNITED  
STATES SUPREME COURT.

REPLY OF PETITIONER TO RESPONDENT'S MOTION  
AND BRIEF OPPOSING WRIT OF  
CERTIORARI.

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## INDEX

I. Supreme Court Exceeded Its Jurisdiction in Reversing and Remanding Case	1
II. Change of Theory Doctrine As Argued by Respondent Is Not Applicable to This Case	4
III. Fact That the Defendant Outgrew the Classification of Section 11834 and No Other Statute Applied Would Not Give a Good Ground or Reason to Still Apply That Section to Defendant	7
IV. Petitioner Is Charged with "Dilatory Tactics"	8

### TABLE OF CASES

American Constitution Fire Assurance Co. vs. O'Malley, 342 Mo. 139, 13 S. W. 2d 795	6
Carter County vs. Hewitt, 303 Mo. 194	2
Cartwright vs. McDonald County, 319 Mo. 848, 5 S. W. 2d 54	2, 3
Curry vs. Dahlberg, 341 Mo. 897, 110 S. W. 2d 742	4
Eisen vs. John Hancock Mutual Life Ins. Co., 230 Mo. App. 312, 91 S. W. 2d 81	5
Greer vs. St. Louis, Iron Mountain & Southern Ry. Co., 173 Mo. App. 276, 158 S. W. 740	5
Holland Banking Co. vs. Republic Nat. Bank, 328 Mo. 577, 41 S. W. 2d 815	6
Home Tel. & Tel. Co. vs. City of Los Angeles, 227 U. S. 278, 57 L. Ed. 510	3
Huttig vs. Brennan, 328 Mo. 471, 41 S. W. 2d 1054	6
Kentucky vs. Am. R. Express Co., 273 U. S. 639	3
Perkins vs. Burks, 336 Mo. 248, 78 S. W. 2d 845	2, 3
Robertson vs. Brotherhood of Locomotive Firemen, 114 S. W. 2d 136, 139	6

**INDEX**

Saunders vs. Shaw, 244 U. S. 317, 61 L. Ed. 1163, 1165	3
State of Missouri ex rel. vs. Gehner, 281 U. S. 313, 74 L. Ed. 870	3
State ex rel. Alton R. R. vs. Public Service Commis- sion, 334 Mo. 985	2
State ex rel. Hart vs. Mazuch, 68 S. W. 2d 923	2
Ward vs. Christian County, 341 Mo. 1115, 1118, 111 S. W. 2d 182, 183	2, 7

**STATUTES**

R. S. Mo., Sec. 11834	2, 3, 7
U. S. C. A., Sec. 350, p. 376, Tit. 28	8

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## **REPLY OF PETITIONER TO RESPONDENT'S MOTION AND BRIEF OPPOSING WRIT OF CERTIORARI.**

In his brief, under ground No. I, respondent contends "The petition is devoid of merit because there is involved in this case no federal question, reviewable by the Supreme Court of the United States."

Our answer is briefly stated as follows: The trial court dismissed the plaintiff's cause of action. The Missouri Supreme Court, by its opinion, reversed the trial court and ordered "the cause remanded with direction to enter judgment for plaintiff as asked."

We say the Supreme Court exceeded its jurisdiction in so doing, in that the court held that Section 11834 applied to Jackson County, when in fact the section did not apply to that county. Therefore, if the section did not apply to Jackson County, the Supreme Court had no jurisdiction to order the entry of the "judgment for plaintiff as asked."

It was from the very beginning incumbent upon the plaintiff to allege and prove that during the time involved in this case, the then existing and applicable statutes provided for compensation in excess of that which he received.

"It is well-settled law that a right to compensation for the discharge of official duties is purely a creature of statute, and that the statute which is claimed to confer such right must be strictly construed. *State ex rel. Linn County v. Adams*, 172 Mo. 1, 72 S. W. 655, 656."

*Ward v. Christian County*, 341 Mo. 1115, 1118, 111 S. W. 2d 182, 183.

Plaintiff recognized this obligation and undertook to meet it (R. 9 of abstract of record in Missouri Supreme Court) and defendant challenged his allegations (R. 23). The existence or nonexistence and the applicability or nonapplicability of the various statutes thus appear on the face of the record or by judicial notice. That courts will take judicial notice, not only of the population of cities and counties as shown by the census reports (*Carter County v. Hewitt*, 303 Mo. 194; *State ex rel. Alton R. R. v. Public Service Commission*, 334 Mo. 985; *State ex rel. Hart v. Mazuch*, 68 S. W. 2d 923) but also of the votes cast at general elections and of the results obtained by applying the statutory multiple to the aggregate of such votes is established by the cases of *Cartwright v. McDonald County*, 319 Mo. 848, 5 S. W. 2d 54, *supra*, and *Perkins v. Burks*, 336 Mo. 248, 78 S. W. 2d 845, *supra*.

"If this is so, the respondent was entitled, under the terms of the statute, only to such salary as pertained to the office on November 2, 1920, and that, we may judicially notice from the 1916 official election returns and the provisions of Sections 11352 and 11354, Revised Statutes, 1919, was the \$1,350 salary he has already received."

In *Perkins v. Burks, supra*, the court said, l. c. 253-254:

"However, here, there was no disputed fact question; both the census and the total vote at the 1928 presidential election which determined Perkins' salary under the respective contentions of the parties were facts already determined by public officers of which a court would even take judicial notice (*Cartwright v. McDonald County*, 319 Mo. 848, 5 S. W. 2d 54)."

We, therefore, submit that for the Missouri Supreme Court to have held that Section 11834, Revised Statutes of Missouri, applied (which it had to do and, in fact, did do, in order to justify a directed judgment "for the plaintiff as asked") to a county whose population did not bring it within its provisions, was an excess of its jurisdiction and "was in clear conflict with those fundamental principles which have been established in our system for the protection and enforcement of private rights" (*Kentucky v. Am. R. Express Co.*, 273 U. S. 639), and therefore denied the defendant County, by its judicial decision "due process of law" and "equal protection of the law" as guaranteed by the Federal Constitution. A violation by judicial interpretation, or the application of a law that is not in fact applicable is as much an excess of jurisdiction as though it never had jurisdiction of either the parties or the subject matter.

*Saunders v. Shaw*, 244 U. S. 317, 61 L. Ed. 1163, l. c. 1165.

*Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U. S. 278, 57 L. Ed. 510.

*State of Missouri ex rel. v. Gehner*, 281 U. S. 313 74 L. Ed. 870.

## II.

The change of theory doctrine as argued by respondent is not applicable to this case.

In the first place, there is *no* change of theory. Defendant demurred to the plaintiff's petition, thus challenging its stating a cause of action. Further by answer the defendant denied the applicability of *any* statute which gave plaintiff, or his assignors, any rights for any statutory salary.

Even though there be a change of theory and the new or changed theory demonstrates that the plaintiff cannot, under any circumstances recover, then the court must follow the changed theory.

In *Curry v. Dahlberg*, 341 Mo. 897, 110 S. W. 2d 742, plaintiff sued on a contract for services. Judgment was entered for the defendant. The services consisted in the plaintiff, a layman, soliciting persons to employ defendant, also a layman, to conduct litigation in their behalf. The court held that, even though the question were not raised by the defendant, the court itself on its own motion would hold the contract to be in violation of the statutes, against public policy, illegal and unenforceable. The court said, l. c. 906:

"When it clearly appears from the record proper that a plaintiff is not entitled to any relief whatever, an appellate court is justified, if in fact it is not its duty, to so declare even though it must raise the decisive question *sua sponte* and the result would be a reversal (see *Massey-Harris Harvester Co. v. Federal Reserve Bank*, 226 Mo. App. 916, 48 S. W. 2d 158; *Greer v. St. L., I. M. & S. Ry. Co.*, 173 Mo. App. 276, 158 S. W. 740; Secs. 1062-1063, R. S., 1929; 4 C. J. S., Secs. 1239-1368; 3 Am. Jur., Secs. 250-251 and 295). Certainly this court should raise the question where a vitally important matter of public policy is involved, and examination of the bill of exceptions conclusively shows that the judgment rendered by the trial court reached the correct result and should be affirmed."

It is proper to here add that not only in this case will a great amount of public funds be taken, but will invite the prosecution of many other similar cases.

In *Greer v. St. Louis, Iron Mountain & Southern Ry. Co.*, 173 Mo. App. 276, 158 S. W. 740, the court said, l. c. 286-7:

"It is also an unquestioned proposition of law that where a petition is so fatally defective and lacking in essential averments as to fail to state any cause of action, then this objection may be successfully raised at any time and in any manner, and if not raised at some time or in some manner by the parties litigant, then the duty devolves on the court to raise it *sua sponte*; and, while it is true that an objection to the introduction of any evidence on the ground that the petition fails to state a cause of action is looked upon with disfavor by all the courts, yet, as no objection whatever is necessary to save this point, even that method of objection is sufficient as against such a fatal defect."

The court, consequently, went to the length of reversing the cause.

In *Eisen v. John Hancock Mutual Life Insurance Company*, 230 Mo. App. 312, 91 S. W. 2d 81, which was an action upon a group life insurance policy, a judgment in favor of the plaintiff was affirmed. The court said, l. c. 324:

"We agree with the trial court in his conclusion as to the nature of the cards furnished by the defendant. Whether the court was correct in deciding that an application was actually made on behalf of Eisen sufficient to effect insurance upon his life, we need not say, for the reason it is quite apparent that no application was required to be made by or for him. From what we have said there was insurance effective upon the life of Eisen without any application made by or for him. Assuming that the trial court erred in its theory in deciding the case, still we will not reverse the judgment and remand the cause. This, for the reason that under all of the written evidence

and undisputed oral testimony, and the disputed oral testimony, taken in its most favorable light to the defendant, a new trial could not result otherwise than in the same judgment.

"It is true, as contended by the defendant, that ordinarily a case must be decided in this court upon the same theory that it was tried in the lower court. However, this rule is applied only where there is at least a possibility that another result might be reached by another trial. Where there has been a judgment for the defendant and error committed against plaintiff at the trial but the appellate court finds that there can be no recovery by plaintiff upon any theory, or where there had been a judgment for plaintiff and error committed against the defendant and there is a correct theory under which unquestionably plaintiff must recover in view of all of the facts and there is no room for the belief that any further facts would be developed at another trial, so that a new trial would result in the same judgment as the one under review, the appellate court will not reverse the judgment but will affirm it (*Ward v. Quinlivin*, 65 Mo. 453; *Renshaw v. Reynolds*, 317 Mo. 484; *Rolla Produce Co. v. Am. Ry. Exp. Co.*, 205 Mo. App. 646; *Dodson v. Dedman*, 61 Mo. App. 209; *Daniel v. Atkins*, 66 Mo. App. 342; *Anderson v. Railroad*, 131 Mo. App. 580)."

*American Constitution Fire Assurance Co. v. O'Malley*, 342 Mo. 139, 13 S. W. 2d 795.

*Huttig v. Brennan*, 328 Mo. 471, 41 S. W. 2d 1054.

*Holland Banking Co. v. Republic Nat. Bank*, 328 Mo. 577, 41 S. W. 2d 815.

In *Robertson v. Brotherhood of Locomotive Firemen*, 114 S. W. 2d 136 (Mo. App.), the court said, l. c. 139:

"This was an erroneous theory. But if the judgment below was for the right party, even though it was arrived at on a wrong or different theory of the law from that upon which it must rest, yet it should be affirmed on appeal. *Aloe v. Fidelity Mutual Life Ass'n*, 164 Mo. 675, l. c. 700, 55 S. W. 993; *Wilhelm v. Security Benefit Ass'n*, (Mo. App. K. C.) 104 S. W. 2d 1042, l. c. 1046."

We, therefore, conclude this point by saying there is no change of theory, but even so, when, as here, the party does not under any circumstances have a right to recover, and the reviewing court erroneously applies a statute which is not applicable, this amounts to and is an excess of jurisdiction which violates the 5th and 14th Amendments of the Federal Constitution, and affords this court ample grounds for assuming jurisdiction and righting the wrong. "Where there is a wrong, there is a remedy."

### III.

The fact that the defendant, Jackson County, outgrew the classification of Section 11834 and *no other statute applied* would not give a good ground or reason to still apply that section to defendant, Jackson County.

If no express statute gave a right to a fixed salary, then when respondent accepted month after month and year in and year out, what was agreed upon, no cause of action arose in favor of plaintiff (*Ward v. Christian County*, 341 Mo. 1115, 1118, 111 S. W. 2d 182, 183 *supra*).

This court is not called upon to construe Section 11808 "in an unreasonable way that it would result in a hopeless jumble and a mockery of the law" as argued by respondent (p. 10 of Brief). All that this court is called upon to do is to rule the Missouri Supreme Court exceeded its jurisdiction in ruling a directed judgment on a statute that did not apply to the petitioner.

Section 11808 is plain and simple and needs no construing. It merely provides the manner of "determining the population of any county \* \* \* for ascertaining the salary of any county officer \* \* \* or the amount he shall be allowed to pay for deputies or assistants, the highest number of votes cast at the last previous general election \* \* \* shall be multiplied by five, and the result shall be considered and held for the purpose aforesaid as the true population of such county."

We demonstrated in our argument in support of the writ that the defendant County was not within the 150,000 to 500,000 classification as required by Section 11834.

#### IV.

Petitioner is charged with "dilatory tactics" in that the petition and record for this writ was not filed until a few days short of the three months period allowed by provisions of Title 28, United States Code Annotated, Section 350, page 376. Nevertheless, it was filed within the period provided for in that section.

Also, it is mandatory and proper that we exhaust all remedies we may have in the Supreme Court of Missouri to obtain a proper ruling of this case.

We hardly see how the fact we were diligent, and the *amici curiae* intervened, should destroy our right to a review of a judgment which was based on a petition that did not state a good cause of action, and to review a judgment which was based on an erroneous application of a statute to defendant, which amounted to an assumption of jurisdiction which the court did, in fact, not have.

We submit that the brief of respondent has not shown any logical or proper reason whereby applying Section 11808 to the "highest vote" cast in Jackson County makes Section 11834 applicable to the petitioner.

Respectfully submitted,

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